Neutral Citation Number: [2022] EWHC 2489 (Ch)

Case No: CH-2021-000029

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
HIS HONOUR JUDGE GERALD

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 10/10/2022

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

CAMPDEN HILL GATE LIMITED	**Appellant**
- and -	
DUCHESS OF BEDFORD HOUSE RTM COMPANY LIMITED & ORS	**Respondents**

- -
- -

David Holland KC (instructed by **Boodle Hatfield LLP**) for the **Appellants**
Edward Francis (instructed by **Edwin Coe LLP**) for the **Respondents**

Hearing dates: 5 and 6 April 2022

- -

Approved Judgment

This judgment was handed down remotely at 10am on Monday 10 October 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

1. This is an appeal from a decision of HHJ Gerald sitting in the Central London County Court.

2. The parties' dispute is about car-parking.

3. The successful Claimants below (and Respondents in this appeal – but I will continue to refer to them as "*the Claimants*" for convenience) are the owners of long leases of flats within a property known as Duchess of Bedford House in Holland Park. Duchess of Bedford House is a 1930s mansion block which faces onto a private road known as Sheldrake Place East. There are three separate entrances to Duchess of Bedford House, and so in effect it is divided into three blocks of flats within the same building. Sheldrake Place East is part of a larger garden square, Sheldrake Place.

4. In the middle of Sheldrake Place are two other inter-war mansion blocks known as Campden Hill Gate. Campden Hill Gate Limited ("*CHG Limited*"), the unsuccessful Defendant below (and the present Appellant – but I will refer to it where necessary as "*the Defendant*") is the headlessee of Campden Hill Gate, and indeed of the other parts of Sheldrake Place including the roads and central gardens.

5. For some time, car parking in Sheldrake Place, and particularly in Sheldrake Place East, has been a matter of contention between residents of Duchess of Bedford House and those of Campden Hill Gate.

6. To resolve matters, the Claimants sought from HHJ Gerald a declaration of their claimed right to park in Sheldrake Place. HHJ Gerald found in favour of the Claimants as regards parking on Sheldrake Place East, i.e., that part of Sheldrake Place facing Duchess of Bedford House. He made a declaration in the following form:

> *" ... each of the Claimants, as underlessees of flats within the mansion block of residential flats known as Duchess of Bedford House, Duchess of Bedford Walk, London W8 7QW ('Duchess of Bedford House'), has the benefit of a Right to Park on the eastern limb of the private road known as Sheldrake Place onto which Duchess of Bedford House fronts ('Sheldrake Place East')."*

7. The unsuccessful Defendant, CHG Limited, now seeks to challenge that determination by way of appeal. The successful Claimants, the owners of flats in Duchess of Bedford House, seek to uphold it.

Some Background

8. Some brief background is useful to set the scene for what follows.

9. At all material times the freehold title to Duchess of Bedford House, Campden Hill Gate and Sheldrake Place itself was held by the trustees of the Phillimore Kensington Estate ("*the Phillimore Estate*").

10. The Phillimore Estate had originally granted a long lease of Duchess of Bedford House in 1929, and out of that had been granted in 1938 both a long under-lease and a long sub-underlease. The evidence at trial was that by 1969, most if not all of the individual flats in Duchess of Bedford House were let out under short, three-year, Rent Act protected tenancies. The Judge heard evidence about the parking habits of the tenants, and I will need to come back to that below, but in short the Judge accepted the submission that there was a settled practice of them parking their cars on Sheldrake Place East.

11. Turning then to Campden Hill Gate, in August 1969, the whole of Campden Hill Gate and of the roads, garage block and central gardens of Sheldrake Place were demised by the Phillimore Estate to CHG Limited's predecessor in title, Keston Securities Limited, under a long headlease (with a 95½ year term) dated 11 August 1969 ("*the 1969 Headlease*").

12. This was an important event in the context of the proceedings below, because under the 1969 Headlease certain rights were reserved to the lessor, i.e., the Phillimore Estate. Such rights included, "*all other easements quasi-easements and rights belonging to or enjoyed by any adjoining or neighbouring premises*". Encompassed within this language, argued the Claimants, and thus reserved to the Phillimore Estate, was a right enjoyed by Duchess of Bedford House (which the parties were agreed was an "*adjoining or neighbouring premises*") for its residents to park on Sheldrake Place East. Moreover, argued the Claimants, the effect of the reservation was to create (by way of regrant) a legal easement of the claimed right to park.

13. It seems that parking on Sheldrake Place was an issue even in the early 1970s. In October 1973, an application was made for planning permission by the then owner of the 1969 Headlease, Courtfield Securities Limited, to carry out alterations to Sheldrake Place which would have involved the installation of lockable diagonal parking bays down the western side of Sheldrake Place East (i.e. on the side of the road opposite Duchess of Bedford House). The purpose was said to be to control the haphazard parking of cars and a haphazard parking situation. In the event the application was opposed, including by many of the residents of Campden Hill Gate itself, and ultimately was refused in March 1974 and a subsequent appeal was dismissed.

14. Meanwhile, also in March 1974, the leasehold structure in relation to Duchess of Bedford House changed as well. The 1938 leases were surrendered, and the Phillimore Estate entered into a new long lease of Duchess of Bedford House dated 15 March 1974 ("*the 1974 Headlease*") with London Midland Associated Properties Limited as the headlessee. The term was 99 years. The 1974 Headlease was another important part of the Claimants' case in the proceedings below. They argued that one effect of the grant of the 1974 Headlease was to pass down to the headlessee the right to park on Sheldrake Place East which the freeholder of Duchess of Bedford House, the Phillimore Estate, had reserved to itself under the 1969 Headlease. This occurred, submitted the Claimants, in one of two ways:

    i) If, in fact, the effect of the reservation to the Phillimore Estate in 1969 was to create a legal easement in favour of Duchess of Bedford House, then the 1974 Headlease had the effect of granting the benefit of that legal easement to the new headlessee.

ii) Alternatively, if by 1974, the right to park did not already have the character of a legal easement, then it was converted into a legal easement by operation of s.62(2) of the Law of Property Act 1925 ("*LPA 1925*").

15. CHG Limited resisted both these propositions, and argued that even if the right to park in Sheldrake Place East *was* reserved to the Phillimore Estate under the 1969 Headlease, and whether or not it had the character of a legal easement by 1974, it certainly was not passed on under the 1974 Headlease of Duchess of Bedford House. That is because that Headlease contained an express carve-out of rights and entitlements which were *not* to be passed on, and the right to park fell within the terms of that carve-out.

16. To complete the basic chronology, I should add that in March 1976, the 1969 Headlease (incorporating Campden Hill Gate) was acquired by the Defendant, CHG Limited. CHG Limited is a company whose members are all owners of flats in Campden Hill Gate.

17. As to Duchess of Bedford House, over time the short, Rent Act protected tenancies which had existed in 1969 were replaced by long underleases, entered into between about 1974 and 1979. The present Claimants are lessees under such long underleases. It was common ground between the parties that if, in fact, the right to park was passed down to the headlessee of Duchess of Bedford House by means of the 1974 Headlease, then it was further passed down to the individual flat owners on the grant of the long underleases to them over time.

The Judgment Below

18. I will say more about the detail of HHJ Gerald's reasoning below, in dealing with the Grounds of Appeal and the Respondents' Notice. In outline, however, his reasoning was as follows:

i) A right to park on Sheldrake Place East, appurtenant to Duchess of Bedford House, existed in 1969. This conclusion rested on (a) HHJ Gerald's analysis of the factual evidence he had available, as to the parking habits of the residents of Duchess of Bedford House in 1969; and (b) HHJ Gerald's application of the principle of law recognised by Sir Robert Megarry V-C in his unreported decision in Newman v. Jones (22 March 1982).

ii) The right to park *was* reserved to the lessor, the Phillimore Estate, under the terms of the 1969 Headlease, because it fell within the scope of the reservation mentioned at [12] above, i.e. "*all other easements quasi-easements and rights belonging to or enjoyed by any adjoining or neighbouring premises"*. Moreover, the effect of the reservation in law was to convert what was previously only a *de facto* right or quasi-easement into a legal easement in favour of Duchess of Bedford House and its freeholder, the Phillimore Estate. In reaching that conclusion, HHJ Gerald rejected the Defendants' submission that the right claimed was too vague and imprecise to have the character of a legal easement.

iii) Finally, the right to park *was* then passed on by the Phillimore Estate to London Midland Associated Properties Limited under the terms of the 1974

Headlease of Duchess of Bedford House. It was not excluded by the carve-out language in the 1974 Headlease, as the Defendant suggested. Thereafter, since it was common ground that the rights available to London Midland Associated Properties Limited were passed down to the present owners of the flats in Duchess of Bedford House on the grant of long leases to them, the upshot was that the Claimants and the other flat-owners all had the benefit of the right to park.

The Appeal

19. All of these findings are challenged by way of appeal, although the Grounds of Appeal follow a different order to the logic of the Judge's analysis, because Mr Holland KC put at the forefront of his argument (as Ground 1) a challenge to the last step in that analysis, i.e. the point that the benefit of any right to park was passed on by the Phillimore Estate under the terms of the 1974 Headlease. He said that in fact the right to park was not passed on because it fell within the language of the carve-out and so was excluded from the demise. The Claimants, meanwhile, by means of their Respondents' Notice, sought to uphold HHJ Gerald's conclusion as to the effect of the carve-out for an additional reason which was not accepted by him.

20. In summary, the issues which arise in light of the Grounds of Appeal and the Respondent's Notice are as follows (re-ordered into what appears to me a more helpful sequence for present purposes):

    i) Is the Judge's evaluation of the factual evidence as to parking practices in 1969 properly open to challenge (Ground 4)?

    ii) Did the Judge reach the correct conclusions about the effect of the 1969 Headlease, and more particularly (Grounds 2, 3 and 5):

        a) did he correctly apply the principle of law derived from Newman v. Jones in recognising the existence of a *de-facto* right or quasi-easement corresponding to the right to park;

        b) was he correct to conclude that any *de facto* right or quasi-easement constituting the right to park was included in the reservation in the 1969 Headlease, and so reserved in favour of the freehold owner, the Phillimore Estate; and

        c) was he correct to conclude that the effect of the reservation was to convert the right to park into a legal easement appurtenant to Duchess of Bedford House (and within that, was he correct to conclude that the right to park was sufficiently certain in scope to qualify as a legal easement)?

    iii) Did the Judge reach the correct conclusion in law about the effect of the 1974 Headlease, and in particular was he correct to conclude that the benefit of the legal easement reserved in favour of Duchess of Bedford House was passed on to London Midland Associated Properties under the 1974 Headlease, or on a proper construction of that Headlease was the legal easement in fact excluded from the demise by means of the carve-out I have referred to (Ground 1)?

21. I think it convenient to discuss the points arising in that order.

Discussion & Conclusions

The Evaluation of the Factual Evidence (Ground 4)

22. The Judge's conclusions on the factual evidence appear at a number of different points in his Judgment:

    i) Para. 54:

    > *"Thus, drawing those strands together, in my judgment, the clear picture which emerges is that Duchess of Bedford House residents who owned a car or vehicle parked it or them in Sheldrake Place East, as did their visitors. That was a substantial number of residents or visitors. It is not possible to precisely quantify how many".*

    ii) Para. 55:

    > *" .. the overall thrust of the evidence ... is that a substantial number of Duchess of Bedford House residents who owned a car at any one time parked their vehicle in Sheldrake Place East as did their guests."*

    iii) Para. 65:

    > *" ... [there is] sufficient evidence to demonstrate that for a reasonable period of time before the, in this case, reservation, the residents of Duchess of Bedford House as a whole parked a sufficient amount of vehicles over a sufficient period of time consistent with there being a general right of residents who owned cars at any particular time to park at Sheldrake Place East or, to adopt the language of Sir Robert Megarry, that there was a settled practice of residents or tenants parking their cars on Sheldrake Place East ...".*

23. Mr Holland KC for the Defendant challenged these factual findings. In doing so he said that they do not represent a proper evaluation of the evidence presented.

24. On the topic of residents' parking habits, the Judge had both written and oral evidence from Ms Sophia Loverdos and Mr Christian Wolmar. Both were residents of Duchess of Bedford House in 1969, although Ms Loverdos was only aged 14 at that point. Amongst the documentary evidence, the Judge had available an aerial photograph of Sheldrake Place, including Duchess of Bedford House and Sheldrake Place East, dating from June 1969, just a few weeks before the date of the 1969 Headlease.

25. As to the evidence of Ms Loverdos, Mr Holland KC said that she had been able to identify only seven occupants of flats in Duchess of Bedford House, including her mother, who were said to park cars on Sheldrake Place East in 1969. Ms Loverdos had been unclear whether they all lived in the same (central) block as her mother, but even if they did, so that in order to get an overall picture one had to make an

allowance for occupants of the other blocks as well, that still did not support the Judge's analysis. That is because he had proceeded on the basis (at [54] of his Judgment) that around 10 to 15 occupants of the central block (not 6 or 7) had parked on Sheldrake Place East, and on that mistaken basis had gone on to say (at [55]) that if one took the same numbers for the other two blocks, "*that would bring the number to around thirty to forty-five*." Mr Holland KC said that was a mistaken analysis.

26. As to the evidence of Mr Wolmar, Mr Holland KC said that had been of limited utility. Mr Wolmar had really only said that quite a lot of residents of Duchess of Bedford House owned cars in 1969; but he had not said that all or most of them actually parked in Sheldrake Place East. Moreover, his evidence as to individual flat occupants had been rather sketchy.

27. As to the aerial photograph, Mr Holland KC said that the Judge had read too much into this. It showed only six cars parked on that side of Sheldrake Place East occupied by Duchess of Bedford House. The opposite side of Sheldrake Place East was partly obscured in the photograph by some trees, and the Judge had been wrong to infer that there must also have been vehicles on that side of the road. He was thus wrong to have expressed the view that there were in the region of 10 to 15 cars in total parked on Sheldrake Place East at the time the photograph was taken. That was illegitimate guesswork. Moreover, the cars shown in the photograph may equally well have belonged to residents of Campden Hill Gate rather than Duchess of Bedford House. At any rate, the Judge was not entitled to assume that they were owned by occupants of the latter. Taking these points together, the photograph did not support the conclusion that a substantial number of residents of Duchess of Bedford House parked in Sheldrake Place East. If anything it showed the opposite because 6, or even 10 to 15 cars, was not a "*substantial number*", bearing in mind there were 47 flats in total in Duchess of Bedford House.

28. I am not persuaded by any of these arguments and reject this Ground of Appeal. In my opinion the Judge was perfectly well able to find on the evidence that in 1969 a substantial number of Duchess of Bedford House residents who owned a car or vehicle parked it or them in Sheldrake Place East, as did their visitors.

29. In a well-known passage in Staechelin & Ors v ACLBDD Holdings Ltd & Ors [2019] EWCA Civ. 817, Lewison LJ at [114] warned that appellate Courts should not interfere with findings of fact by trial judges, unless compelled to do so. That applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.

30. Here, it seems to me relevant to consider the nature of the evaluation the Judge made. It was a qualitative rather than a quantitative assessment. The Judge recognised that himself at a number of points in his Judgment, including at [55] where he said there was a danger in "*trying to reduce this [i.e. his evaluation] to a mathematical exercise*"; and then again at [66] when he said that it was not necessary for him to make any "*particular finding as to the amount or number of residents, only to be satisfied that there are sufficient … .*"

31. I consider that was an understandable and correct approach, and although there may have been an error in one part of the Judge's analysis, as I will mention, I am not at all

persuaded that his overall evaluation was wrong, and I do not consider that I should interfere with it.

32. Mr Holland KC's attack focused on only part of the evidence, namely the evidence as to precise numbers. Granted, that was an element in the overall analysis, but it did not stand alone. The examples given of individual flat occupants were, as it seems to me, just that - specific examples of a wider phenomenon of car ownership and parking habits. As Mr Francis pointed out in his Skeleton Argument, Ms Loverdos gave evidence of this wider phenomenon at a number of points in her Witness Statement. For example at para. 8 she said:

> "*When we moved into the flat and my mother parked her car in front of our block on Sheldrake Place, there was never any doubt that she could park on Sheldrake Place East ... We always just tried to park on Sheldrake Place East as a matter of convenience as it was nearest to the entrance*."

33. At para. 26, she said:

> "*I definitely had the impression that the vast majority of people parking in Sheldrake Place East were residents of [Duchess of Bedford House]. This is because it was a question of ease and we would try to park as close as we could to the entrance*."

34. Then at para. 28 she said, referring to her family:

> "*Of course, we were not the only residents of [Duchess of Bedford House] who parked freely on Sheldrake Place. Every [Duchess of Bedford House] resident who owned a car would park freely there*."

35. And at para. [31]:

> *"Residents obviously came and went over the years and it was my impression that the vast majority of flats will have been occupied by people who owned cars from time to time."*

36. It is true that the evidence given by Mr Wolmar in cross-examination was about car ownership rather than, specifically, about parking habits; but his evidence on the former point was entirely clear and consistent with that of Ms Loverdos. He said:

> " *... at the time there was solid middle class people there*
>
> *...*
>
> *And they tended to, you know, they were professionals or whatever and would have cars and I think there's 48 flats, isn't there, or 47 flats and, you know, I would have thought most people would have cars*."

37. I agree that the evidence of both witnesses on these points is somewhat impressionistic, but nonetheless (1) a clear overall picture emerges, and (2) it seems to

be entirely consistent with common sense and the inherent probabilities. The picture is that Duchess of Bedford House was largely populated with middle class professional people, among whom at the time there was a relatively high incidence of car ownership; and when those occupants came to park their car or cars, they would try to do so as close as possible to the building in which they lived. There is nothing at all surprising about that picture. It is just what one might have expected. It fully supports the overall conclusion the Judge arrived at.

38. What then of the detail Mr Holland KC draws attention to? It seems to me the Judge likely did fall into error in assuming, as he appears to have done, that the evidence enabled him to say specifically that as many as fifteen residents of the centre block of Duchess of Bedford House had cars and parked them on Sheldrake Place East. But I do not consider that that invalidates his overall conclusion.

39. I think the correct position on the evidence is that Ms Loverdos was only able specifically to name 7 or 8 residents of Duchess of Bedford House who owned cars. These are set out in the table prepared by Mr Francis and provided to the Judge, and referred to before me. The occupants were: Mr and Mrs Loverdos; Mr Duggan; Mr and Mrs Harper; the "*British/French family*"; the "*Italian family*"; Mr and Mrs Smilovitz; Mrs Bain and her brother; and Mr and Mrs Morris.

40. I am satisfied, by reference to Mr Francis' table, that these were residents of the centre block of Duchess of Bedford House, and I did not understand that point to be seriously disputed by Mr Holland KC. Granted, a total of say 7 or 8 is less that 10-15; but at the same time, one must remember that there were only 14 flats in the centre block, and in such circumstances it seems to me Mr Francis is correct to say that 7 or 8 is a significant number out of such a total. In any event, they were only examples of the wider phenomenon both Ms Loverdos and Mr Wolmar described. I did not understand it to be said that they were an exhaustive list. In fact, Ms Loverdos said so expressly in her evidence when she observed:

> *"I'm not trying to tell you about everybody. I can only tell you that with certainty for the few that I have mentioned. That's why I have not mentioned generally. I've tried to mention only people that I have certainty about. That's why I have not mentioned others."*

41. Looked at in context, I find the evidence given as to specific occupants entirely consistent with the overall picture I have described. The overall picture, according to Ms Loverdos, was that the vast majority of residents from time to time owned cars and parked them on Sheldrake Place East. That is consistent, it seems to me, with the idea that even at this distance of time, Ms Loverdos could recall 7 or 8 names from a total of 14 flats. There is no good reason to think that there would have been a different pattern of car ownership, and of parking habits, among the occupants of flats in the other two blocks.

42. Turning then to the aerial photograph, in my opinion the real question about this is whether it shows anything which actually undermines the Judge's overall conclusion, as Mr Holland KC submitted it did. It is true that only six cars are visible on Sheldrake Place East, but there may have been more, obscured by the trees. I do not think it was wrong for the Judge to infer that probably there were more cars,

consistent with the pattern of parking on Sheldrake Place West (also shown on the photograph), which shows cars parked on both sides of the road. Furthermore, as Mr Francis pointed out, the position of the sun and shadows in the photograph appear to indicate it was taken during the daytime, and both Mr Wolmar's evidence, and common sense, would suggest that parking activity would have been busier during the evening period, when residents were not at work. Finally, there is the fact, as the Judge himself recorded, that the photograph is of limited utility since it is only a snapshot.

43. It seems to me that Mr Holland KC's point was really that certain aspects of the aerial photograph (i.e., the limited number of cars actually visible) pointed to a different conclusion that the one reached by the Judge. I am not sure that is correct, but even if it were, it is just another way of saying that there were some potential inconsistencies in the overall evidential pool. That is often the case, however, and is usually why a decision by a Judge is needed. The role of the Judge, having heard all the evidence, is then to reach an overall evaluation and give a decision. It is not a valid ground of appeal merely to point to one piece of the overall pool of evidence which, viewed in one light, might be said to point in the opposite direction to that overall evaluation. Rather, an appeal Court must be satisfied that the overall evaluation is clearly wrong. Here, I am not so satisfied.

44. In light of the above, my conclusion is that I must reject Ground 4 of the Appellant's Grounds of Appeal.

The 1969 Headlease (Grounds 2, 3 and 5)

45. By means of the reservation in the 1969 Headlease, the Phillimore Estate (as "*Lessors*") reserved to themselves (amongst other things) the following:

> " *... (ii) full rights of way for the Lessors in common with all persons entitled to the same whether granted or acquired by prescription at all times and for all purposes over Sheldrake Place aforesaid, shown coloured brown on the said plan (iii) all other easements quasi-easements and rights belonging to or enjoyed by any adjoining or neighbouring premises.*"

46. This part of the appeal was largely focused on the effect of the language at (iii). The particular question was whether it was apt to reserve in favour of the Phillimore Estate a right to park on Sheldrake Place East, similar (but not identical) to that recognised by Vice-Chancellor Megarry in Newman v. Jones. HHJ Gerald considered it was. Mr Holland KC for the Defendant challenged that conclusion.

47. In Newman v. Jones, Mr and Mrs Newman were lessees of a ground floor flat (Flat 1) in a block of 14 flats in Torquay. They had acquired the lease on assignment from the original lessees, Mr and Mrs Morris, who had taken on the lease in November 1971. The freehold owner of the block was the Defendant, Mr Jones.

48. An issue arose as to whether Mr and Mrs Newman had an entitlement to park a car on the forecourt of the block of flats. The primary submission made by Mr and Mrs Newman was that the 1971 lease in favour of Mr and Mrs Morris had granted an easement of the right to park. Sir Robert Megarry V-C was not persuaded that any

right to park was conveyed by the express language of the lease, but thought it *was* conveyed by the general language of s62(2) LPA 1925. Section 62(2) provides as follows (emphasis added):

> *"A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."*

49. As to whether there was in fact any privilege, easement right or advantage corresponding to the claimed right to park, Megarry V-C thought there was.

50. As to the facts, the key date was November 1971, the date of the lease to Mr and Mrs Morris. Sir Robert Megarry V-C's key holding (p.26C) was that (again, emphasis added):

> *" ... at the time of the grant of the lease to Mr and Mrs Morris there was a settled practice of tenants parking their cars on the forecourt".*

51. That finding reflected the evidence of Mr Morris, who had said that after moving in, he and all the other residents parked their cars outside their flats. It also reflected the evidence of another tenant, Mr Brown, who had said that residents were allowed to park their cars near the entrances to their flats; that there was room for 10-12 cars; and that although there were some difficulties, some residents had no cars and so there was usually enough room for those who did have cars. There was, it seems, some doubt about whether the occupier of Flat 1 prior to Mr and Mrs Morris had a car, or if she did, whether it was parked on the forecourt or garaged elsewhere.

52. As to the legal effect of the "*settled practice*", Sir Robert Megarry V-C said as follows at 26E-27A:

> *"In my opinion, where there is a block of flats, and the tenants in general regularly park their cars within the curtilage of the block, the liberty, privilege, easement, right or advantage of being allowed to do this will rapidly become regarded as being something which appertains or is reputed to appertain to each of the flats in the block, and as being reputed appurtenant to each of those flats. Accordingly, on the grant of a lease of one of the flats, I think that section 62(2) of the Law of Property Act 1925 will operate to give the lessee an easement of car parking appurtenant to his leasehold. I do not think that it matters whether the previous occupant of the particular flat did or did*

> *not park their car within the curtilage of the block, or, indeed, whether they had any car. In all ordinary cases the reputation will be that of a right of parking which goes with each of the flats, for there will be no reason for one lessee to have greater rights than another in this respect. The question, 'can the tenants park their cars round the block?' would receive a simple yes, and not an answer which distinguished between one flat and another on the basis of whether previous occupants of the flat in question had been accustomed to park their cars round the block."*

53. The Vice-Chancellor then went on to deal with certain objections raised by the Defendant, Mr Jones. Mr Jones' main point was that it would be impractical to recognise a right to park appurtenant to each of the 14 flats in the block, because there was space on the forecourt only for 10-12 cars. Sir Robert Megarry V-C did not think that a valid objection, however. He said as follows at p. 28C-D:

> *"I can see no force in these or in any other of the submissions made by Mr Jones. An easement may take effect subject to the right of others with a like right, without any guarantee that there will be no competition."*

54. In the present case, the Defendant's submissions as to the effect of the 1969 Headlease were effectively as follows:

i) The present situation is very different to that contemplated by Newman v. Jones. That case was concerned with a claim by an individual flat owner against his immediate landlord, in which the tenant sought to establish a right to park in favour of his own flat. The present is a very different case, because here the claim is that the right which existed in 1969 was a right appurtenant to Duchess of Bedford House as a whole, not a right appurtenant to the individual flats.

ii) The Judge's factual findings, even if upheld, did not support the existence of such a right, which could only have arisen had it been apparent that the right was being exercised by or on behalf of *all* the flats in Duchess of Bedford House. It was insufficient to find that "*a substantial number*" of the residents parked, or even that "*a substantial number of residents who owned cars*" parked.

iii) Further, the alleged reservation is said to have been in favour of the ultimate freeholder of the block, the Phillimore Estate. It is very unlikely, as a matter of proper construction of the 1969 Headlease, that the parties to it intended to reserve to the ultimate freeholder rights appurtenant to Duchess of Bedford House arising from the activities of sub-sub-underlessees (i.e., the tenants of individual flats in Duchess of Bedford House), which the ultimate freeholder might have known nothing about. In any event, the alleged right to park was insufficiently clear to amount to a legal easement.

55. Again, I am not persuaded by these points.

56. To begin with, although certainly the context of Newman v. Jones was a claim by the tenant of an individual flat against his immediate landlord, I do not consider Sir Robert Megarry V-C's statement of general principle (see at [52] above) to be confined only to cases of that specific type. More precisely, his statement of principle was that the "*liberty, privilege, easement, right or advantage*" of being allowed to park will, in appropriate circumstances (emphasis added):

> *" ... rapidly become regarded as being something which appertains or is reputed to appertain to each of the flats in the block, and is reputed to be appurtenant to each of those flats."*

57. I see little or no difference between saying that a right is appurtenant to *each* of the flats in a block, and saying the right is appurtenant to the block as a whole. On this point, I think Mr Francis was correct in his submissions to say that a right to park as described by Sir Megarry V-C is equally well capable of existing as a communal right appurtenant to a block as a whole, which is precisely how HHJ Gerald approached the matter in his Judgment when he said at [62] that the "*settled practice*" he had identified in 1969:

> *" ... constituted either a right or quasi-easement which belonged to or was enjoyed with the flats and, therefore, to the block as a whole."*

58. I see no principled reason why that conclusion is wrong. It seems to me consistent with the approach in Newman v. Jones.

59. As to the Judge's reliance on the fact that only "*a substantial number*" of the residents parked on Sheldrake Place East, or "*a substantial number of residents who owned cars*", again it seems to me this was sufficient, having regard to the principle of law described in Newman v. Jones. I do not think it necessary for there to have been evidence that *all* the tenants of Duchess of Bedford House parked on Sheldrake Place East.

60. In Newman v. Jones itself, the key finding (p. 26C) was only that " ... *there was a settled practice of tenants parking their cars on the forecourt*." That was in circumstances where (p.26B) *"[t]here was no superabundance of evidence on the point*", and where moreover there was doubt about whether the previous owner of Flat 1 had owned a car at all.

61. In making his statement of principle, the Vice-Chancellor said in terms at p. 26G: "*I do not think that it matters whether the previous occupants of the particular flat did or did not park their car within the curtilage of the block, or indeed, whether they had any car*." Instead, his approach was a more general one, namely whether the "*settled practice*" of tenants gave rise to a communal right of parking "*which goes with each of the flats*" (see p. 26H).

62. In my opinion, the same test is relevant in this case, and HHJ Gerald was correct to approach the analysis in the way he did. He was not required to find evidence that *all* tenants parked, only evidence of a *settled practice* among tenants, such that (to use the formulation in Newman v. Jones at p. 27A), *"[t]he question, 'can the tenants park*

their cars round the block?" would receive a simple yes, and not an answer which distinguished between one flat and another."

63. It seems to me that that requires a qualitative, not a quantitative, assessment of the evidence. On a fair reading of his Judgment, I consider that is just what HHJ Gerald did.

64. Mr Holland KC criticised the Judge for inconsistency of approach because (for example) he referred at para. [25] of his Judgment to the central question being whether "*the residents of Duchess of Bedford House as a whole used Sheldrake Place to park*" (emphasis added). Mr Holland said that was the correct test, but that, having stated it, HHJ Gerald had then effectively ignored it in reaching his overall conclusion only on the basis that "*a substantial number*" of residents parked on Sheldrake Place East.

65. I do not consider that a valid criticism. It seems to me that, at para. [25] and then again at para. [65], in referencing "*Duchess of Bedford House as a whole*", HHJ Gerald was simply making clear that ultimately the legal question was whether a right had arisen by 1969 which was appurtenant to Duchess of Bedford House as a whole. There is no inconsistency in saying that, in order to arrive at that legal conclusion, the relevant test to apply is whether (see para. [25]) the "*tenants in general*" parked their cars on Sheldrake Place East, or whether (para. [65]) "*there was a settled practice of residents or tenants parking their cars on Sheldrake Place East*."

66. Given the evidence available to him, I consider HHJ Gerald was fully entitled to answer such questions in the affirmative. He did not require evidence that all tenants parked, only such evidence as would enable him to make an appropriate qualitative assessment that a sufficiently settled practice had arisen. At para. [66] of his Judgment, HHJ Gerald put the matter as follows, and I respectfully agree with his analysis:

> *"It is not necessary to make any particular finding as to the amount or number of residents, only to be satisfied that there are sufficient or, to use the word I have used elsewhere, substantial, although necessarily there has to be some numerical evidence to found such a finding. In that respect, the matter has to be looked through the perspective of the position which existed in 1969 at which time fewer people owned vehicles. The fewer the people who owned vehicles, the less likely there are to be a large amount of people parking because they would not own vehicles. Even that of itself does not prevent there being established a general right for those residents who did not have vehicles within Sheldrake Place East. As I have found, there was a sufficiently substantial number for that test to be satisfied."*

67. The question whether there was a sufficiently "*settled practice*" seems to me to be a mixed question of fact and law. It involves application of the facts to a legal standard. Again, an appeal Court should be very reluctant to interfere with such an assessment and should do so only if satisfied the evaluation is wrong. Here I am not so satisfied. I think the Judge was entitled to take the view he did. Indeed I did not understand Mr

Holland KC to be arguing the contrary. As I understood it, his point was simply that the Judge had applied the wrong legal yardstick, and not that, if it was in fact the correct legal yardstick, his application of it to the facts was so obviously flawed that it must be overturned.

68. There are then the points (para. [54(iii)] above) that the reservation in the 1969 Headlease what is not apt to capture the right to park, and that the right is too uncertain and diffuse in scope to have the character of a legal easement.

69. In my opinion, the issue as to the effect of the 1969 Headlease is a straightforward matter of construction. The relevant language, already referred to above, is a reservation in favour of the Phillimore Estate of:

> " *... (iii) all other easements quasi easements and rights belonging to or enjoyed by any adjoining or neighbouring premises*."

70. In light of the conclusions already expressed above, it seems to me the question of construction is entirely straightforward. It is common ground that Duchess of Bedford House qualified in 1969 as an "*adjoining or neighbouring premises*" to Campden Hill Gate. It also seems to me clear that the right to park, as a right appurtenant to Duchess of Bedford House, was a right "*belonging to or enjoyed by*" Duchess of Bedford House. Thus the right to park falls squarely within the express terms of the reservation.

71. Mr Holland KC argued that, standing back, it was quite unrealistic to suppose that the Phillimore Estate (as lessor) and Keston Securities Limited (as lessee) intended by means of the 1969 Headlease to reserve to the former rights appurtenant to Duchess of Bedford House, said to have arisen from the actions of sub-sub-underlessees of which neither the Phillimore Estate nor Keston Securities may have been aware. At any rate there was no evidence that they were so aware.

72. In my view, there are at least two answers to this argument. The first is that the parties' intention is most naturally derived from the language of their agreement, and as I have said, the language of the 1969 Headlease is quite clear. The second is that, as it seems to me, there was a good reason why the Phillimore Estate would have wished to reserve to itself a right such as the right to park. That was because it wished to preserve to itself, to the maximum extent possible, ultimate control over any future plans to develop the Phillimore Estate. Reserving to itself a right such as the right to park would have facilitated that general purpose. I will explain this point further below, in dealing with Ground 1. For now, it is sufficient to note that, just because the Phillimore Estate wished to reserve the right to park to itself in 1969, that does not mean it also wished to grant the benefit of that right to any new headlessee of Duchess of Bedford House in 1974. That is a different matter, which I will come on to shortly.

73. Finally under this heading, there is the Defendant's point that the right to park cannot be an easement because it is too diffuse and general in extent. Mr Holland KC argued that the claimed right is both insufficiently clear and precise (see Regency Villas v. Diamond Resorts [2019] AC 553 at [59]-[61]), and in any event potentially of such a broad scope that it goes beyond the form of parking easement recognised as valid in

the authorities, which typically involves a right to park vehicle or a number of vehicles in a defined area (see Moncrieff v. Jamieson [2007] UKHL 42, [2007] 1 WLR 2620 at [47], [54]-[63] and [137]-[146]). In the present case, the right claimed was for each of the leaseholders of the 47 flats in Duchess of Bedford House, and their licensees, to park an unspecified number of vehicles at any time on Sheldrake Place East, which at most can accommodate between 20 and 22 vehicles (I should say that the Claimants contended there was in fact space for up to 27 cars).

74. I am unpersuaded by these points.

75. In Newman v. Jones at p. 27D-E, Sir Robert Megarry V-C said as follows:

> "*In view of Wright v. Macadam [1924] 2 KB 744 ... I feel no hesitation in holding that a right for a landowner to park a car anywhere in a defined area nearby is capable of acting as an easement*."

76. It seems to me that the present case falls within that statement of general principle. I do not regard the right as too vague or diffuse. The real nub of the objection seems to be that, on any view of it, there were an insufficient number of car parking spaces on Sheldrake Place East to accommodate each and every one of the occupants of Duchess of Bedford House, if they all chose to try and park at the same time. That does not appear to me to be a valid objection, however. The claimed right was not a right to park exercisable come what may, but only a right exercisable in competition with others. The situation seems to me in principle no different to that in Newman v. Jones itself, although it arises on a larger scale and may be said to present a more acute problem given the numbers involved. But all the same, the result in Newman v. Jones was that the claimed right to park was held to exist, even though there was a lack of sufficient car parking space for every tenant in every flat to park a car (see above at [53]). I think the same basic logic applies here, and thus that HHJ Gerald was correct to conclude that the right to park which he found existed in 1969 had the character of a legal easement, once reserved to the Phillimore Estate under the 1969 Headlease.

The effect of the 1974 Headlease (Ground 1 and Respondent's Notice)

77. The question here is whether the right to park, having been reserved in 1969 as a legal easement in favour of Duchess of Bedford House, was then included in the demise by the Phillimore Estate to the new headlessee of Duchess of Bedford House, London Midland Associated Properties Limited, in 1974.

78. The parties were agreed that, although any right to park would otherwise have passed to London Midland Associated Properties upon the grant of the 1974 Headlease (whether automatically under the general law or by operation of s.62(2) LPA 1925), that would not be so if expressly excluded under the terms of the 1974 Headlease. Thus, the parties were agreed that Ground 1 is essentially a question of the proper construction of what I have called the *carve-out* in the 1974 Headlease.

79. Before turning to the language of the carve-out, I should first note that the following was expressly included within the demise on the first page of the 1974 Headlease:

> *"ALL THAT piece and parcel of ground forming part of the Phillimore Kensington Estate situate in the Duchess of Bedford's Walk in the Royal Borough of Kensington and Chelsea TOGETHER with the brick built buildings comprising flats and garages erected thereon or upon some part thereof and known as Duchess of Bedford House … TOGETHER with a right to pass and repass with or without vehicles (in common with the Lessors and all persons for the time being authorised by the Lessors or having similar rights) over that part of the roadway commonly and hereinafter called Sheldrake Place on to which the demised premises abut … ."*

80. There then follow a number of reservations, including the following:

> *"EXCEPT AND ALWAYS RESERVED unto the Lessors (i) the free running of water soil gas and electricity coming from any other buildings or land upon or forming part of the Phillimore Kensington Estate … (ii) all other easements quasi-easements and rights belonging to or enjoyed by any adjoining or neighbouring premises AND ALSO EXCEPT AND RESERVED unto the Lessors and without obtaining any consent from the Lessee or making any compensation to the Lessee the right at any time hereafter to build upon any adjoining or neighbouring land forming part of the Phillimore Kensington Estate aforesaid or to let the same to any person or persons for the purpose of building thereon according to such plans (whether as to height extent or otherwise) as shall be approved by the Lessors or their Surveyors notwithstanding any interference thereby occasioned to the access of light or air to the demised premises."*

81. The undertaking described in the Habendum clause is "*TO HOLD the demised premises unto the Lessee*" for a period of 91 years, but:

> *" … subject … to all rights and easements or reputed or quasi-easements appertaining to any of the adjoining or neighbouring property of the Lessors."*

82. The language of the carve-out then follows in the form of a declaration of matters which are *not* included in the demise. This is as follows:

> "*AND IT IS HEREBY DECLARED that the demise hereby made shall not be deemed to include and shall not operate to demise any ways watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate aforesaid except those now subsisting or which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof or of any other adjoining or neighbouring property*."

83. The difficulty of construction arises both because the language of this provision is rather inelegantly expressed, but also because, confusingly, it takes away with one hand but gives with the other. By this I mean that although the general effect of the language is plainly to *exclude* a wide category of rights and interests from the overall demise, in the middle of the clause there is an exception from that general exclusion, covering "*those now subsisting*". This begs at least two questions, namely (1) what rights and interests are, on the face of it, *excluded* from the demise by means of the general language of the clause, and (2) what rights and interests are nonetheless *included* in the demise, because they fall within the language of "*those now subsisting.*"

84. The approach of HHJ Gerald was to construe the clause as follows (Jgt at [84]-[91]):

i) There is a wide exclusion from the demise of "*all liberties privileges easements rights or advantages whatsoever in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate*", and on the face of it that would *exclude* from the demise the right to park on Sheldrake Place East now recognised as a legal easement appurtenant to Duchess of Bedford House. However –

ii) Included within the demise are all such "*liberties privileges easements*" etc., "*now subsisting*", as long as (following the language of the remainder of the clause), those subsisting liberties, privileges or easements would not compromise any possible future rebuilding, alteration or development works (as described).

85. One might reflect the Judge's construction by expressing its sense as follows, that is to say, it operates to exclude from the demise:

> " … *any ways watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever:*
>
> - *in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate aforesaid except those now subsisting [limb 1], or*
>
> - *[even if they are subsisting] which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof or of any other adjoining or neighbouring property [limb 2]*."

86. Having taken that view of the proper construction of the clause, HHJ Gerald then went on to say (1) that the right to park, being a legal easement since 1969, was a "*subsisting*" right in 1974 (under limb 1); and (2) since he was not persuaded it would in fact compromise any future rebuilding, alteration or development works (under limb 2), it *was* to be included within the overall demise.

87. In this appeal, both the Claimants and the Defendants take issue with HHJ Gerald's approach to construction.

88. The Claimants, by means of their Respondents' Notice, say the Judge gave the carve-out provision too broad an exclusory effect. They argue that, properly construed, its effect was to convey *all* subsisting liberties, privileges or easements *even if* they might have the effect of compromising future works. One can illustrate their point by reconfiguring the language of the clause slightly, so that it has the effect of excluding from the demise:

> *" ... any ways watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever:*
>
> - *in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate aforesaid, or*
>
> - *which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof or of any other adjoining or neighbouring property*
>
> *except those now subsisting."*

89. Relying on this construction, the Claimants then say that since the right to park was a *subsisting* right in 1974 (having been a legal easement since 1969), it therefore fell within the scope of the demise. HHJ Gerald should have so concluded, and did not need to have been concerned with the question whether it might or might not prejudice future redevelopment or alteration works, etc. (although if that was a relevant question, then the Judge had rightly concluded it would not).

90. The Defendant, by its Ground 1, contends that HHJ Gerald gave the carve-out provision too narrow an exclusory effect. It says the purpose of the clause was to exclude from the demise the widest possible category of liberties, privileges and easements, etc., and that *even if* the right to park had been reserved to the Phillimore Estate in 1969 and had the status of a legal easement appurtenant to Duchess of Bedford House, the intention of was *not* to convey the benefit of that easement under the 1974 Headlease. The exception as regards liberties, privileges and easements "*now subsisting*" was simply to make clear, for the avoidance of doubt, that any rights which had previously been *expressly* granted, or were *expressly* referred to in the 1974 Headlease, were to be passed on; but that did not involve including anything new within the demise, unless expressly stated (as was the case in respect of the right of way over Sheldrake Place: see above at [79]).

91. To illustrate the Defendant's position, one might thus express the effect of the clause as follows - that is to say, excluded from the demise are:

> *" ... any ways watercourses sewers drains lights liberties privileges easements rights or advantages whatsoever:*
>
> - *in through over or upon any land of the Lessors or forming part of the Phillimore Kensington Estate aforesaid [although we do not intend to alter the position as regards any rights expressly granted to*

> *previous lessees - for the avoidance of doubt any such rights 'now subsisting' are to be conveyed], or*
>
> - *which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof or of any other adjoining or neighbouring property*."

92. In any event, says the Defendant, even if the Judge's overall view of the carve-out was correct, he was wrong to think that the right to park was not captured by limb 2 of the clause, because it *was* a right which *might* restrict or prejudicially affect future rebuilding, alteration etc., works of the type described.

93. In my opinion, the Learned Judge was correct in his overall view of the way in which the carve-out was to be construed, but wrong to conclude that the right to park was not captured by the second limb.

94. Taking the two points in turn, I approach my analysis in the following way.

Overall Construction of the Carve-Out

95. To begin with, the parties referred me to a number of authorities on the correct approach to the construction of contracts. The principles are well known, and in my view, it is sufficient to note the following the observations of Lord Neuberger in Arnold v. Britton [2015] AC 1619 at [15]. There, Lord Neuberger said that the exercise of contractual interpretation involves seeking to identify the parties' intention by reference to the relevant background, and went on:

> "*And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*"

96. Looking then first at the natural and ordinary meaning of the words of the carve-out, and more specifically at the reference to rights "*now subsisting*", it seems to me this wording is clear. I agree with the submission made by Mr Francis for the Claimants that it must refer to rights which, at the date of the 1974 Headlease, already existed as easements at law or in equity appurtenant to any particular property.

97. The right to park appurtenant to Duchess of Bedford House was such a *subsisting* right over "*land of the lessors or forming part of the Phillimore Kensington Estate*", because it was a right over Sheldrake Place East which was part of the Phillimore Estate. It was a *subsisting* right having taken effect as a legal easement by means of the reservation in the 1969 Headlease.

98. One of Mr Holland KC's submissions was that, read literally, the reference in the carve-out to rights "*now subsisting*" makes little sense. The only rights capable of being transferred as part of the demise were rights which subsisted in one way or another. If one assumes that *all* subsisting rights fall outside the carve-out and are therefore within the demise, than the carve-out – which is plainly intended to be exclusory in effect – has no effect at all. That cannot be correct.

99. I agree with that general observation, but I do not consider it supports Mr Holland KC's overall construction. Instead I agree with Mr Francis' analysis. In my view, a primary purpose of the carve-out was to prevent the conversion into legal easements of any informal, *de facto* rights enjoyed by Duchess of Bedford House at the time of the conveyance but which did not then subsist as easements at law or in equity. Such a process of conversion is well-recognised as one of the effects of s.62(2) LPA 1925: see Wright v. MacAdam [1949] 2 KB 744 at p. 748. That being so, I consider that one effect of the carve-out in this case was to prevent that process of conversion occurring. The Phillimore Estate, as the ultimate freeholder of a number of plots of land forming the overall Estate, would no doubt have been concerned to avoid the risk of inadvertently creating new rights through the operation of the general language in s.62(2).

100. As regards rights "*now subsisting*", however, the position was different. There, it seems to me, there was a tension between competing interests, and a more nuanced approach was required.

101. On the one hand, I consider it natural to think that London Midland Associated Properties, as the new leaseholder in 1974, would have wished to ensure that as far as possible, the new leasehold arrangements being entered into were not less advantageous than those in place under the previous arrangements which were being replaced. It would naturally have wished to ensure that any rights "*now subsisting*" were preserved.

102. On the other hand, that interest was in tension with a countervailing interest on the part of the Phillimore Estate. I think that interest finds expression in the second limb of the carve-out, and also in the reservation I have referred to above at [80]. Both provisions seem to me consistent with the idea that the Phillimore Estate wished to avoid, to the extent possible, ceding control to its lessees of any rights which might inhibit plans for the future development of the Estate, and indeed on the contrary, wished to reserve all such rights to itself as far as it possibly could.

103. In my view, having regard to these competing interests, the natural way in which to read the carve-out is as a compromise. I think that is effectively the way in which HHJ Gerald read it, and I consider he was correct to do so. I therefore reject both the Claimants' challenge to his approach, made by means of their Respondent's Notice, and the Defendant's challenge, made by means of this aspect of its Ground 1.

104. The nature of the compromise was that although no new rights over other parts of the Phillimore Estate would be created by means of the 1974 Headlease, any subsisting rights would be conveyed, unless they might restrict or prejudicially affect any rebuilding or alteration, etc. works of the types described. The intention was that any such rights – which included rights over Sheldrake Place East – would remain in the hands of the Phillimore Estate and would not be passed on to the new headlessee.

The Phillimore Estate would then have ultimate control over any rebuilding, alteration or redevelopment works which might impinge on those rights.

The Second Limb of the Carve-Out

105. Given that I agree with the Judge on the matter of the overall structure of the carve-out, the final question is whether I also consider he was correct to conclude that the right to park, although a *subsisting* right, did *not* fall within the second limb of the carve-out (see above at [85]). To put it another way, was the Judge correct to conclude that the right to park was *not* a right " … *which might restrict or prejudicially affect the future rebuilding alteration or development or redevelopment thereof [i.e., of any land of the Lessors or forming part of the Phillimore Kensington Estate aforesaid] or of any other adjoining or neighbouring property."*

106. The Judge's reason for reaching that conclusion was a simple one. He said as follows at [88] of his Judgment, in addressing the question whether the right to park fell within the second limb of the carve-out:

> *"In my judgment, the simple answer to that question is 'no', because a right of way had been granted over the whole of Sheldrake Place by virtue of which, for all practical purposes, Sheldrake Place East itself cannot be materially altered or developed. The fact that a right to park has been granted on top of the right of way, as it were, makes no difference because the existence of a dedication of that land as the right of way prevents it from being materially altered or developed."*

107. The right of way over Sheldrake Place the Judge referred to was that expressly conveyed as part of the demise under the 1974 Headlease (see [79] above).

108. For the Defendant, Mr Holland KC sought to challenge the Judge's conclusion on this point; for the Claimants, Mr Francis sought to uphold it.

109. I have come to the conclusion that I prefer the Defendant's submissions. In my opinion, HHJ Gerald construed the second limb of the carve-out too restrictively. Had he given the words of the second limb their ordinary and natural meaning, he would have concluded that the right to park *did* fall within the carve-out, and was therefore excluded from the demise under the 1974 Headlease.

110. The Judge's essential logic, apparent from the quotation above, was that the right to park could not restrict or prejudicially affect any future rebuilding, alteration, development or redevelopment of Sheldrake Place East, because the right of way granted over Sheldrake Place already prevented it from being "*materially altered or developed*."

111. In my view, however, this focus on whether Sheldrake Place East could be "*materially altered or developed*" involved a misplaced emphasis, and in making that the focus of his inquiry, the Learned Judge misconstrued the second limb of the carve-out and did not give full effect to its intended scope and reach. That scope or reach was intended to be sufficiently broad to capture any form of rebuilding or alteration etc., perhaps of a nature unforeseen in 1974, which might occur during the 99 year

term of the 1974 Headlease. I think it natural to suppose the Phillimore Estate would have wished to protect its position in that way, and in any case, the intention is apparent from the breadth of the words used. In referring to "*future rebuilding alteration or development or redevelopment ...*", it seems to me the draftsman was intending to cast the net as widely as possible. The word "*alteration*", in particular, is apt to describe a very broad category of possible future changes. As Mr Holland KC pointed out, the wide scope is emphasised by the use of the word "*might*" in the immediately preceding phrase: " *... which might restrict or prejudicially affect ...*". The contingent nature of the word "*might*" makes clear that, in marginal or doubtful cases, the doubt should be resolved in favour of the right in question falling within the carve-out and therefore outside the scope of the demise.

112. During the trial, Mr Holland KC gave examples of possible alterations to Sheldrake Place which would not be restricted by the right of way, but which *might* be restricted by the right to park. These included the example of the proposal put forward for planning permission in 1973 (see above at [13]), i.e., the proposal to instal diagonal parking bays in the western side of Sheldrake Place East, opposite Duchess of Bedford House. Another example, referred to in Mr Holland KC's Skeleton for the present appeal, involved the Defendant wishing to install garages down the western side of Sheldrake Place East. If situated on land which was not Sheldrake Place, said Mr Holland, the garages would have no impact on the right of way; but they would impact on the right to park because residents would no longer be able to park on the side of the road in front of the garages, since doing so would block them in.

113. The Judge concluded that Mr Holland KC's examples were "*ingenious and perhaps extravagant*" (see at [88]), and thought that if one applied a "*practical and realistic approach*" (see at [89]), they could be discounted. As to the example based on the 1973 proposal, he said at [90] that "*the mere alteration of the layout of the servient land, provided it does not materially reduce the number of car parking spaces, could not be prevented by the existence of the right to park*."

114. With respect, in my opinion the Judge rejected the arguments advanced by Mr Holland KC rather too readily. Both the examples referred to show it is actually quite easy to think of possible alterations which "*might*" (not "*would*") be restricted or prejudicially affected by the right to park, while not being restricted by the right of way. In my view, that is enough. Under the wording of the carve-out, the focus of the inquiry is on the right in question, rather than on the particular form of rebuilding or alteration, etc., proposed. One does not need to examine in detail the practical viability of any individual example. The test is designed to be cruder than that. Once you can say that the existence of a certain right (here, the right to park) "*might*" present a problem as regards any potential future rebuilding or alteration, etc., that is the end of the inquiry. Applying that test here, it seems to me obviously correct that the right to park was of such a character that it "*might*" present a problem to any future rebuilding, alteration, etc., of Sheldrake Place East, notwithstanding the existence of the right of way. That is because they are different rights and it is perfectly possible to envisage forms of rebuilding or alteration, etc., which *might* compromise one but not the other, as the examples given illustrate.

115. In those circumstances, I disagree with the Judge's conclusions on the scope of the second limb of the carve-out, expressed between paragraphs [88]-[90] of his Judgment. I think the right to park was of such a type that it *might* restrict or

prejudicially affect any future rebuilding or alteration, etc. of Sheldrake Place East. It was therefore excluded from the demise and, in effect, kept in the hands of the Phillimore Estate. If any future rebuilding or alteration, etc., were proposed which might impinge on the right to park, it would then be within the power of the Phillimore Estate to consent or not consent to it, by waiving the right or choosing not to. That seems to me to fit with the overall scheme of the 1974 Headlease, and indeed, with the scheme of the 1969 Headlease, if the two are looked at together.

116. On this topic, therefore, I have reached a different view to the Judge as a matter of principle, having regard to what I consider the correct meaning of the second limb of the carve-out. For what it is worth, however, I also consider the Judge was wrong in dismissing the particular example of the proposal for locked parking bays put forward in 1973 (see his Judgment at [90]). The Judge thought that the proposed alteration to Sheldrake Place East could not have been prevented by the right to park, because it would not have materially reduced the number of parking spaces available. However, the proposal was to reduce the number of parking spaces to only 12, from a prior total of at least 20 and perhaps (on the Claimants' case) as many as 27. Whether 20 or 27, it seems to me that the proposed reduction was in fact a material one, and that the Learned Judge was wrong to conclude otherwise.

Overall Conclusion & Disposal

117. Although I have rejected Appeal Grounds 2-5, my conclusion is that the Defendant/Appellant's case is made out as regards the critical part of Ground 1, i.e. as to the scope of the second limb of the carve-out in the 1974 Headlease.

118. It follows that the Appeal is allowed.